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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

MARISA ALVAREZ, ET AL.,

Plaintiffs and Appellants,

v.

HARNEK S. BEHNIWAL, ET AL.,

Defendants and Respondents.

2d Civil No. B172000

(Super. Ct. No. CIV 210606)

(Ventura County)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[No Change in Judgment]

THE COURT:

It is ordered that the opinion filed herein on January 27, 2005, be modified as follows:

On page 9, after the first sentence of the second paragraph beginning with the word "Regardless" and ending with the word "applies" add as footnote 4 the following:

4. Appellant in his petition for rehearing argues that *Elsner v. Uveges* (2004) 34 Cal.4th 915 changes the analysis because respondents failed to prove a safe workplace as required by Cal-OSHA. (Lab. Code, § 6400.0 Although the breach of such a duty of care shifts the burden of proof (*Id.*, at p. 924; Lab. Code, § 6304.5; Evid. Code, § 669), respondents rebutted the negligence presumption by showing that the risk of harm was not reasonably foreseeable. "Ordinarily, foreseeability is a question of fact for the [trier of fact]. (Citation.)" *Bigbee v. Pacific Tel & Tel. Co.* (1983) 34 Cal.3d 49, 56,

citing *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46.) Foreseeability may be used to analyze either duty or proximate cause. (6 Witkin, Summary of Cal. Law 9th Ed. 1988) Torts, § 751, p. 90; e.g., *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31, 42-43 [breach of statutory duty of care but no causation]; *Gonzales v. Derrington* (1961) 56 Cal.2d 130, 133-134 [unforeseeable that third party would intentionally injure others after purchasing open can of gasoline sold in violation of city ordinance].)

There is no change in the judgment.

Appellants' petition for rehearing is denied.

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